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COUNTER-STATEMENT OF QUESTION PRESENTED.

Whether the refusal to permit owners of land situated in the neighborhood of a tract of land, which tract is the subject of an appeal by its owner from a conditioned grant of a zoning permit, to intervene in that zoning appeal where said neighboring landowners seek to introduce into that appeal proceeding the issues raised by them as appellants in their separate appeal from the grant of said permit (which appeal said neighbors had voluntarily withdrawn with prejudice) and where the municipality, in which said tracts are situated, is defending the landowners appeal as appellee, is a denial of the right to intervene a violation of the Due Process Clause of the Fourteenth Amendment?

COUNTER-STATEMENT OF CASE.

In April, 1969, Respondent, Peirce Junior College ("Peirce"), purchased seventy-five (75) acres of ground in Easttown Township, Chester County, Pennsylvania. The Peirce property is situated in the AA and A Residential Zoning Districts of Easttown Township, which permit single-family residential use on two and one acre lots respectively and also permit educational uses when permitted by the Board of Supervisors of the Township as a conditional use. The Petitioners' properties are situated in the vicinity of the Peirce tract in this rural-suburban area of Easttown Township.

On February 4, 1972, Peirce filed an application with Easttown Township for a conditional use permit to use its property for a junior college. Pursuant to the provisions of the Easttown Township Zoning Ordinance, a hearing was held before the Planning Commission of Easttown Township at which Peirce presented evidence relating to its proposed use in compliance with standards set forth in the Zoning Ordinance. The Petitioners were present or represented at that hearing but did not present any evidence or witnesses contrary to Peirce's position. Thereafter, the Board of Supervisors of Easttown Township held hearings on the Peirce Application on May 18 and June 2, 1972, at which Peirce again presented its witnesses and evidence with respect to its proposed use. The Petitioners were again present and represented at the hearings before the Board of Supervisors and again failed to present evidence in opposition to Peirce's proposed use. The Board of Supervisors adjourned the hearings on June 2, 1972 and resolved to remand the matter to the Township's Planning Commission. Peirce then proceeded, in the Court of Common Pleas of Chester County, Pennsylvania, to obtain a Writ of Mandamus ordering the Board of Supervisors to

render a decision on the Peirce Application. Thereafter, pursuant to the Writ, at a regular meeting on January 21, 1974, the Board of Supervisors passed a Resolution granting the conditional use subject to a number of restrictive conditions. The Petitioners appeared at that Township meeting and requested allowance to present additional evidence on the Peirce Appeal. This request was denied by the Board of Supervisors, the hearings having been adjourned eighteen months prior to said time, but did accept into the record an offer of proof presented by the Petitioners with respect to their proposed evidence.

Both the Petitioners and the Respondent appealed the decision of the Board of Supervisors of Easttown Township. Pursuant to Section 1007 of the *Pennsylvania Municipalities Planning Code*, Act of January 1, 1969, P. L. 805, as amended, 53 P. S. 11007, the Petitioners appealed the Board of Supervisors' decision to the Zoning Hearing Board of Easttown Township. In their appeal, the Petitioners sought a hearing at which to present additional evidence with respect to Peirce's Application and additionally sought reversal of the grant of the proposed use. The Zoning Hearing Board of Easttown Township advertised an evidentiary hearing on the Petitioners' appeal for April 2, 1974, at which time Petitioners would be permitted to present the additional evidence which they desired. However, on March 29, 1974, the Petitioners suddenly and voluntarily withdrew, with prejudice, their appeal to the Zoning Hearing Board and cancelled the evidentiary hearing.

Concurrent with the Petitioners' appeal to the Zoning Hearing Board of Easttown Township, Peirce, pursuant to Section 1006 of the Pennsylvania Municipalities Planning Code, 53 P. S. 11006, appealed the imposition of the conditions upon the grant of the conditional use to the Court of Common Pleas of Chester County. Easttown Town-

ship has appeared and actively participated as Appellee in said appeal.

In mid-March, 1974, Petitioners petitioned the Court of Common Pleas of Chester County for leave to intervene as Appellees in Peirce's appeal. In their Petition to Intervene, the Petitioners set forth three (3) courses of conduct which they intended to pursue if permitted to intervene: (a) they would seek to quash the appeal, alleging that Section 1006 of the Pennsylvania Municipalities Planning Code required Peirce's appeal to be taken to the Zoning Hearing Board; (b) they would seek to have the matter remanded to the Board of Supervisors for resumption of the evidentiary hearing to present additional testimony; and, (c) they would seek the reversal of the grant of the conditional use based upon the present record or, in the event that such reversal is denied, the sustaining of the conditions. Subsequent to the filing of the Petition to Intervene and prior to any answer or action thereon, Petitioners withdrew their appeal to the Zoning Hearing Board, as mentioned above, and cancelled the evidentiary hearing before the Zoning Hearing Board of Easttown Township, at which time they could have presented the evidence which they now seek [a remand] to present to the Board of Supervisors.

Pursuant to the Pennsylvania Municipalities Planning Code, intervention in zoning appeals by persons other than the owner of the ground subject to the appeal is governed by the Pennsylvania Rules of Civil Procedure. *Pennsylvania Rule of Civil Procedure* 2329, *42 Pa. C. S. A.* 2329 (1975), provides that intervention may be denied, inter alia, (a) if the claim or defense of the Petitioner is not in subordination to or in recognition of the propriety of the action in which intervention is sought, or (b) if the interest of the petitioner for intervention is already adequately represented in said action. Peirce in its answer to the Peti-

tioners' Petition to Intervene alleged that the courses of conduct which Petitioner asserted it would follow if permitted to intervene would not be in subordination to or in recognition of the propriety of the existing appeal of Peirce but would instead enable the Petitioners, by intervening as appellees, to become appellants and advance, as such, the issues which Petitioners had sought to raise in their appeal to the Zoning Hearing Board. After argument, the Court of Common Pleas of Chester County denied the Petitioners' Petition to Intervene on the grounds that the issues Petitioners sought to raise were not subordinate to or in recognition of the propriety of the present pending appeal of Peirce and that the interest of the Petitioners as residents of the Township with respect to the enforcement of the Zoning Ordinance of the Township, were adequately represented by the appearance of the Township Solicitor in defense of the Board of Supervisors.

Petitioners then appealed the denial of their intervention to the Commonwealth Court of Pennsylvania, which after argument, affirmed the decision of the Court of Common Pleas of Chester County. The Commonwealth Court, in light of the issues Petitioners sought to raise, refused to disturb the discretionary judgment of the Court of Common Pleas with respect to the denial of intervention pursuant to Pennsylvania Rule of Civil Procedure 2329. It should be noted that both the Court of Common Pleas and the Commonwealth Court recognized that if the Petitioners had merely sought to defend the conditions imposed by the Board of Supervisors, intervention would have undoubtedly been granted. However, at argument before both courts, Petitioners strenuously reasserted their intention to seek both a remand for the purpose of holding further evidentiary hearings and the ultimate denial of the conditional use requested by Peirce.

Subsequent to the affirmance of the lower court decision by the Commonwealth Court of Pennsylvania, Petitioners petitioned for allowance of appeal to the Supreme Court of Pennsylvania. Said petition for allowance of appeal was denied by the Supreme Court of Pennsylvania, per curiam.

REASONS FOR DENYING THE WRIT OF CERTIORARI.

I. The Petitioners Have Not Properly Exhausted the Remedies Provided by the Laws of the Commonwealth of Pennsylvania and Therefore Certiorari Should Be Denied.

Where a petitioner alleges that state procedure has deprived him of due process of law without adequate opportunity for a hearing, the petitioner must have properly invoked existing state remedies before certiorari will lie to determine whether state procedures have denied the petitioner due process. *Phyle v. Duffy*, 334 U. S. 431 (1948), reh. denied, 334 U. S. 862. "The fact that (Petitioner's) opportunity for a hearing was lost because misapprehension as to the appropriate remedy was not removed by judicial decision until it was too late to rectify the error does not furnish the basis for a claim that due process of law has been denied." *American Surety Company v. Baldwin*, 287 U. S. 156, 162 (1932).

The law of Pennsylvania has provided a procedure whereby a neighboring landowner who believes himself aggrieved by the decision of the municipality pursuant to the municipality's zoning ordinance may appeal that decision to the zoning hearing board, a local judicial tribunal whose decisions may be appealed to the Court of Common Pleas. The Petitioners in this case elected to appeal to the Zoning Hearing Board from the decision of the Board of Supervisors on Peirce's application. A hearing was set on their appeal for April 2, 1974, at which hearing the Board, pursuant to the *Pennsylvania Municipalities Planning Code*, Section 1005, 53 P. S. 11005, would have been required to hear Petitioners' evidence. The *Pennsyl-*

vania Municipalities Planning Code, in Section 908, 53 P. S. Section 10908, governing hearings to be held by the Zoning Hearing Board, specifically provides that all parties shall be afforded the opportunity to present evidence on all relevant issues. In essence, the Commonwealth of Pennsylvania has provided a procedure in which citizens who wish to assert positions such as those advanced by the Petitioners in this matter, may obtain a forum to present such evidence as they desire, together with a right of judicial appeal therefrom. In short, the Petitioners have intentionally determined not to follow the procedure created by the Commonwealth of Pennsylvania for the adjudication of their claims.

Instead, the Petitioners have sought to advance their positions by attempting to intervene in a proceeding provided by the state for the determination of the issues raised by Peirce. The Petitioners appear to argue that since the Peirce proceeding is advancing at a higher judicial level than the appeal of the Petitioners, the Petitioners appeal will be precluded from full and proper consideration by reason of prior determination of the Peirce appeal. However, the Petitioners fail to explain why the prior determination of the Peirce appeal will be prejudicial to the questions raised in Petitioners appeal. Clearly, there is a lack of identity with respect to the parties in the appeals; and there is also likely to be a lack of identity with respect to the issues raised therein. In addition, the Pennsylvania Municipalities Planning Code has provided procedures which will rapidly advance the Petitioners' appeal to the Court of Common Pleas, thereupon to be consolidated with the Peirce appeal, assuming the issues then in question are proper for consolidation.

If the Petitioners had pursued the procedures provided them by the law of Pennsylvania, and could there-

after factually substantiate their claim that having done so they were denied a full and adequate hearing, this Court could then consider the issuance of a Writ of Certiorari for the purpose of reviewing the adequacy of the state procedures in light of constitutional requirements. However, Petitioners ill-founded, unsubstantiated assertions cannot and should not provide a basis for the review of state procedures on the grounds that they violate constitutional mandates. See *Phyle v. Duffy,* 334 U. S. 431 (1948).

In addition, it should be noted that the Petitioners present inability to reinstate the proper state procedure does not constitute an exhaustion of state remedies upon which a Petition for Writ of Certiorari can be based. In *American Surety Co. v. Baldwin,* 287 U. S. 156 (1932), the Appellant, through misapprehension of state procedures sought relief by filing a motion to vacate the judgment entered against it rather than by appealing the judgment. By the time the impropriety of proceeding by motion to vacate had been judicially determined, it was too late to rectify the error of failing to take an appeal. This Court held that the failure to be able to rectify the error and follow the prescribed procedure did not furnish a basis for a claim in federal court that due process law had been denied. The present Petitioners *voluntarily* withdrew their use of the mandated state procedure, with prejudice. Clearly, the holding of *American Surety Co. v. Baldwin* precludes federal jurisdiction in such instances.

II. The Petitioners Do Not Have "Property Interests" Which Fall Within the Realm of Procedural Due Process Protection.

In the proceeding pending before the court of Common Pleas of Chester County, Pennsylvania, Respondents have challenged the validity of conditions attached by the

Board of Supervisors of Easttown Township to a conditional use permit granted by the Township upon an application filed pursuant to the Township's zoning ordinance. The position of Petitioners herein is that to permit judicial consideration of the validity of the conditions attached to the Respondent's use permit without granting the Petitioners an opportunity to participate in the hearing thereon deprives them of certain "property rights" without due process of law. Petitioners allege that their real estate within the municipality will decline in value, and noise and traffic in the vicinity of the site will increase, if the conditions imposed by the Township on the proposed use are invalidated.

In their Brief, the Petitioners strenuously argue that "property interest" cannot be denied without an opportunity for full hearing. In support thereof, they cite many cases, all dealing with specific, tangible, *individual* property. But the right to operate an automobile, the right to use one's own leasehold, the right to maintain one's own structure, the right to sell one's own premises, and the right to sell one's own skills and talents are all rights directly related to property independently acquired and held by private persons. They are not analogous to the Petitioners claim of a private, independently enforceable, amorphous interest in the real property of others.

While the police power may be used to subvert the property rights of individuals to the public welfare, it may not be used to subvert inherent property rights of individuals to the benefit of other private individuals. See *Federal Housing Administration v. Darlington, Inc.*, 358 U. S. 84 (1958) reh. denied, 358 U. S. 937 (1959). The police power lies with the governmental body and is enforceable thereby. Undisputably, Easttown Township has unhaltingly pursued the enforcement and validity of its use of the police power.

Petitioners cite the case of *Wilkinson v. Leland*, 2 Pet. 627, 657 (1829) for the proposition that "the right of citizens to free enjoyment of their property lawfully acquired" is a fundamental principal of republican government. However, it is this very principal of which the Petitioners, themselves, lose sight. The Zoning Ordinance of Easttown Township is being used to regulate and restrict the right of Peirce to freely use and enjoy its property for educational purposes. For half a century, this court has recognized the power of the states, and their municipalities to restrict and regulate such uses for the *public* welfare, provided such regulation is a legitimate assumption of the police power. *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365 (1926). In compliance with the constitutional requirements of due process, the Commonwealth of Pennsylvania has provided the proceeding pending below to enable Peirce to receive a full hearing on the deprivation of its property rights resulting from the enforcement of the zoning regulations as administered by the Township against the Peirce tract.

The Petitioners have, without legal support or argument, unwarrantedly assumed that the legislative determination that the application of the Zoning Ordinance to the Peirce tract as interpreted by the Municipality, has created individual property rights in each petitioner to maintain whatever benefits they may experience as a result of the Municipality's action. It is inconceivable that Easttown Township could validly restrict the use of the Peirce tract for the purpose of creating an enforceable right in each of the Petitioners to maintain the present market values of their properties? Clearly, the local legislative body in its wisdom could rezone the Petitioners neighborhood in a manner which would increase noise and traffic in their area while also decreasing market values. Finally, a novel and unreasonable proposition

results from the extension of the Petitioners' assumption; namely that each and every beneficiary of a federal state, or local statute or ordinance, whether or not his benefit which was intended or even envisioned by the legislative body, obtains from the existence of such benefit a property right therein which gives rise to procedural due process protection in the form of a full opportunity to be heard in every proceeding in which the statute or ordinance, or any portion or interpretation thereof, is in question.

The cornerstone of the Petitioners request for relief is their assumption that they have acquired enforceable property interests as a result of the municipality's actions administering its zoning ordinance with respect to a tract of land in which they admittedly have no property interest. Since this assumption is clearly without merit, foundation, reason or justification, Petitioners' argument for relief must fall with its foundation.

III. The Extent to Which Intervention Is Constitutionally Compelled Is Clear.

In the same manner in which they have constructed their initial argument, Petitioners have cornerstoned the argument that intervention may be constitutionally compelled on a fictional assumption. That assumption is that there is constitutionally guaranteed right of intervention, the very conclusion their argument seeks to reach.

This Court clearly stated in *Dohany v. Rogers*, 281 U. S. 362, 369: "The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure." The requirements of due process are reasonable notice and a reasonable opportunity to be heard. *Goldberg v. Kelly*, 397 U. S. 254 (1970). That the reasonable right to be heard is in a forum different than the one Petitioners would desire it to be, does not give rise to a claim of denial of due process.

Thus, even if, arguendo, the Petitioners do possess some important property interest of which they may be deprived by the Respondent's use of their tract as proposed, unfettered by the conditions imposed by the Township, the failure to permit the Petitioners to obtain a hearing on their claims or defenses in the present proceeding pending before the Common Pleas Court of Chester County does not deny the Petitioners due process. The Commonwealth of Pennsylvania has provided at least two other forums and proceedings in which the Petitioners claims and defenses may receive a full hearing in adjudication.

First, as noted in Argument I above, the Petitioners claims and defenses may be presented, as framed by them, before the Zoning Hearing Board of Easttown Township. Statutory provisions provide for both full and adequate hearings therein and for judicial appeal therefrom. However, Petitioners have voluntarily withdrawn from the pursuit of this process.

In addition, the claims and defenses of Petitioners may also be heard in an action brought by them to enjoin Respondent's use of their tract as a private nuisance. Judicial sanction of the Respondent's use, vis-a-vis the Township's Zoning Ordinance, would not preclude the protestant's prosecution of such an action. Nor would the delay of a hearing on the Petitioners' claims and defenses until after the Respondent's actions have commenced create a denial of due process. *Bowles v. Willingham*, 321 U. S. 503 (1944).

The Petitioners' reliance on Rule 24 of the Federal Rules of Civil Procedure is misplaced. Although the Petitioners would assert that it is not clear whether Rule 24, which governs intervention in Federal Courts, is a statement of constitutional principals, it is clear that the constitution does not require the states to establish judicial procedures which are parallel, or even consistent, with the

Federal Procedure. The requirement is that state judicial procedures be adequate to comport with the due process requirements of the constitution. *United Gas Public Service Co. v. State of Texas,* 303 U. S. 123 (1938).

It is clear that the Commonwealth of Pennsylvania has provided at least two adequate methods to safeguard any rights which the Petitioners may have with respect to the Respondent's proposed or actual use of its land. The fact that Petitioners may have been able to proceed in a different fashion in Federal Court is of no moment.

CONCLUSION.

The questions which Petitioners purport to raise in their brief arise, if at all, from (1) the Petitioners' voluntary decisions neither to avail themselves of the present procedures provided by the Commonwealth of Pennsylvania nor to permit future courses of action to ripen; and, (2) the numerous fictitious assumptions by the Petitioners in the creation of their arguments. The writ sought by Petitioners is not supported by law or fact, and Respondent's respectfully urge this Court to deny the issuance of a Writ.

Respectfully submitted,

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